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No. 79-742

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

HOTEL CONQUISTADOR, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY MEMORANDUM FOR THE UNITED STATES

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Washington, D.C. 20530

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1. a. Respondents concede (Br. in Opp. 12 n.6) that the question whether the value of meals furnished to employees on a daily basis is taxable as "wages" under FICA and FUTA and includable in the identical Social Security Act "wages" benefits base is of "substantial importance." They oppose certiorari, however, on the principal ground that this Court's decision in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), resolved the issue in their favor.

But as we have pointed out in our petition (pages 16-17), *Central Illinois Public Service Co.* does not control this case. That decision addressed the scope of particularized Treasury Regulations (Treasury Regulations on Employment Tax, Section 31.3401(a)-1(b)(2) 26 C.F.R.) that excluded from "wages"—for purposes of income tax withholding—amounts paid to reimburse employees for the cost of meals consumed during non-

overnight travel. There are comparable Regulations excluding such reimbursements from the FICA and FUTA tax base (see 26 C.F.R. 31.3121(a)-1(h) and 31.3306(b)-1(h)). But the question presented in this case—whether the value of meals furnished to employees in non-travel status constitutes "wages" under FICA, FUTA, and the Social Security Act—is governed by an entirely different set of Regulations that unambigiously require the inclusion of such amounts in the tax and benefits base. Indeed, in ruling on the question of the excludability of non-overnight meal reimbursements for purposes of income tax withholding, the Court in *Central Illinois Public Service Co.* explicitly left open the question "whether a new regulation that, for withholding purposes, would require the treatment of lunch reimbursement as wages under the existing statute would or would not be valid" (435 U.S. at 32 n.12). See also 435 U.S. at 38 (Powell, J., concurring). Given the existence of longstanding FICA, FUTA, and Social Security Act Regulations requiring the inclusion of the value of daily meals in the "wages" tax base and the "wages" benefits base, *Central Illinois Public Service Co.* does not decide the issue in this case which affects both employers' taxes and employees' benefits.

b. Apparently recognizing that the issue in this case is governed by Regulations that were not at issue in *Central Illinois Public Service Co.*, respondents attack (Br. in Opp. 12-17) the validity of those Regulations on the ground that the Commissioner's position with respect to the question presented has not been consistent.

But the essential fact that cannot be gainsaid is that since 1940 virtually identical legislative Regulations under the Social Security Act[1] and the Internal Revenue Code[2] have included the value of free meals furnished to restaurant and hotel employees in the FICA and FUTA "wages" tax base and the Social Security Act benefits base. These Regulations must be upheld unless shown to be unreasonable and plainly inconsistent with the statute. *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501 (1948). See also *National Muffler Dealers Association* v. *United States*, 440 U.S. 472, 485-486 (1979). Most of the changes in the Commissioner's position cited by respondents antedated the original 1940 version of these Regulations and are therefore irrelevant; the other rulings which respondent characterizes as inconsistent either involved the wholly different income tax withholding statute or dealt with businesses other than hotels or restaurants. There has been accordingly no variance in the Treasury's position that casts doubt upon the validity of the Regulations.[3]

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[1]Social Security Board Regulations on Federal Old-Age and Survivors Insurance under Title II of the Social Security Act, Section 403.827 (20 C.F.R. (1940 Supp.)); Social Security Board Regulations on Federal Old Age, Survivors and Disability Insurance (1950-), Section 404.1026(a)(5), (6) (20 C.F.R. 1969 ed); Social Security Administration Regulations on Federal Old-Age, Survivors and Disability Insurance (1950-), Section 404.1026(a)(5), (6) (20 C.F.R. (1979 ed.)).

[2]Treasury Regulations 106, Section 402.227 (1940 ed.) (FICA); Treasury Regulations 107, Section 403.227 (1940 ed.) (FUTA); Treasury Regulations 128, Section 408.226 (1951 ed.) (FICA); Sections 31.3121(a)-(e) and (f) (FICA) and 31.3306(b)-1(e) (FUTA) of the Treasury Regulations on Employment Tax (26 C.F.R.).

[3]Nor does the government's position in the Court of Claims in this case evidence the inconsistency that respondents seek to attribute to the Commissioner's treatment of meals for FICA and FUTA tax purposes. Contrary to respondents' contention (Br. in

2. Finally, respondents attempt to refute (Br. in Opp. 8-9) the existence of a conflict between the decision below and *Pacific American Fisheries* v. *United States*, 138 F. 2d 464 (9th Cir. 1943) and *S.S. Kresge Co.* v. *United States*, 379 F. 2d 309 (6th Cir. 1967). But those cases squarely hold that the Regulations which the Court of Claims acknowledged to be controlling (Pet. App. A 15a) but cast aside as a "nearly worthless" "guide to employers" (Pet. App. A 14a)—required the inclusion in the FICA and FUTA tax base of the value of meals furnished to employees. In so ruling, the Ninth and Sixth Circuits specifically rejected the rationale, upon which the decision below rests (Pet. App. A 10a-11a), that meals furnished to employees for the employer's business convenience are not "wages" for purposes of FICA and FUTA (see 138 F. 2d at 465-466; 379 F. 2d at 310). Accord: *S.S. Kresge Co.* v. *United States*, 218 F. Supp. 240, 242-243 (E.D. Mich. 1963).

Opp. 7, 10), the statements in the government's brief in the Court of Claims in this case and in the Fourth Circuit in *Royster* v. *United States*, 479 F. 2d 387 (1973), that the term "wages" has the same meaning under all of the employment tax statutes, were made prior to this Court's decision in *Central Illinois Public Service Co.* on the assumption that the reimbursements for meals consumed during non-overnight travel at issue in that case were not travel expenses. Our point at that time was that because the statutory and regulatory definition of "wages" for purposes of income tax withholding was narrower than under FICA and FUTA, a decision in favor of the government in *Central Illinois Public Service Co.* would have required a similar ruling in the instant case. However, given the basis of this Court's decision in *Central Illinois Public Service Co.* that non-overnight meal reimbursements were travel expenses under the Regulation at issue in that case, it is plain that the statements in the government's briefs cited by respondents do not speak to the question presented here involving meals furnished to employees in non-travel status. (For the convenience of the Court, we are lodging with the Clerk copies of the government's briefs in the Court of Claims in this case and in the Fourth Circuit in *Royster*).

Moreover, just as the meals in *Pacific American Fisheries* and *S.S. Kresge Co.* were a specific element of the employees' compensation (see 138 F. 2d at 465-466; 218 F. Supp. at 244), so too were the meals at isue here. Respondents' labor agreements required them to provide meals to their employees on a daily basis or to pay $1.25 for each meal not furnished (Pet. App. A 3a). Accordingly, the compensatory character of these meals and the conflict of decisions cannot be denied.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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